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NOTE

DRUG ABUSE, LAW ABUSE, AND THE EIGHTH AMENDMENT: NEW YORK'S 1973 DRUG LEGISLATION AND THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

I

INTRODUCTION

On January 3, 1973, in his fifteenth annual State of the State Message, New York Governor Nelson A. Rockefeller remarked: "[T]he number one, growing concern of the American people is crime and drugs—coupled with an all-pervasive fear for the safety of their person and their property."¹ Rockefeller detailed the rising sense of frustration which led him to conclude that only two courses of action were available: "Either we can go on as we have been, with little real hope of changing the present trend; [o]r we must take those stern measures that, I have become convinced, common sense demands."²

The thrust of the Rockefeller proposals, which emphasized deterrence and isolation of the drug offender,³ was largely directed at divesting the judiciary of discretion in the disposition of indictments and the imposition of sentences.⁴ Mandatory life imprisonment was proposed for all dealers in dangerous drugs,⁵ and neither plea bargaining nor possibility of parole, nor youthful offender treatment would be available for certain trafficking offenses.⁶

The Rockefeller message was greeted with both approbation and opprobrium, and it precipitated an intensely emotional de-

¹ *Message to the Legislature*, 1973 N.Y. LEG. DOC. NO. 1, at 16.

² *Id.* at 18.

³ "We must create an effective deterrent to the pushing of the broad spectrum of hard drugs. . . . [S]ociety has no alternatives." *Id.* "I . . . will ask for legislation making the penalty for all illegal trafficking in hard drugs a life sentence in prison." *Id.* at 19 (emphasis in original).

⁴ Signorelli, *A Judicial Analysis and Critique of the New Drug and Sentencing Laws*, 46 N.Y.S.B.J. 9 (1973).

⁵ Under the proposals, "dangerous drugs" included heroin, hashish, LSD, and amphetamines. *Message to the Legislature*, *supra* note 1, at 19.

⁶ *Id.* at 19-20.

bate.⁷ With certain modifications of the original proposals, the Rockefeller drug law was passed in a highly partisan atmosphere⁸ and was signed into law on May 8, 1973.⁹

Extreme sentencing provisions are the hallmark of the new legislation, with mandatory maximum life terms for all narcotic drug sales, for possession of narcotic drugs in quantities in excess of one ounce, and for a variety of possession and sale offenses involving LSD, stimulants, hallucinogens, hallucinogenic substances, and meth-amphetamines (minimum penalties being graduated according to the quantity of the substance involved).¹⁰ In all, there presently exist some thirty-two different drug offenses (exclusive of criminal attempts) for which the life sentence must be imposed.¹¹ The mandatory minimum sentences which accompany the life term range from one to twenty-five years depending upon the felony classification.¹²

Without doubt, this statutory scheme is the most severe in the nation, and comes during a national trend toward the reduction of possession offenses to the level of misdemeanors and the increasing availability of conditional discharge procedures for many first

⁷ Some of the reaction was extremely favorable. For example, Dr. Benjamin Watkins, a prominent New York civic leader known as the "Mayor of Harlem," who had been the victim of numerous robberies, felt that his freedom of movement had been significantly impaired by the threat of violence from drug-related activity. He seemed to endorse the Rockefeller proposal when he commented that the "harshes't treatment possible is needed to 'remove this contagion from our community.'" N.Y. Times, Jan. 5, 1973, at 38, col. 6. A variety of perspectives on the proposed legislation are represented in *Law & Order & Drugs—Penal Approach to the Drug Abuse Problem: A Panel Discussion*, 2 CONTEMP. DRUG 435 (1973). The overwhelming reaction of legal commentators and the press, however, was unfavorable. See Hardt & Brooks, *Social Policy on Dangerous Drugs: A Study of Changing Attitudes in New York and Overseas*, 48 ST. JOHNS L. REV. 48, 96 (1973): "The timing of the Act is unique, coming . . . at a time when use of heroin . . . has been declining for a year"; N.Y. Times, May 4, 1973, at 1, col. 6 (New York Civil Liberties Union declaring passage of law as "one of the most ignorant, irresponsible, and inhumane acts in the history of the state"); N.Y. Times, Jan. 15, 1973, at 14, col. 1 (labelling proposal as "Archie Bunker Law" and "completely unworkable"); N.Y. Times, Jan. 10, 1973, at 40, col. 2 (editorial characterizing proposal as "simplistic" and "lock-em-up-for-life" program); N.Y. Times, Jan. 4, 1973, at 29, col. 1.

⁸ N.Y. Times, May 9, 1973, at 1, col. 1.

⁹ 1 N.Y. Laws 1973, c. 276, p. 1040.

¹⁰ See generally N.Y. PENAL LAW § 220 (McKinney Supp. 1974).

¹¹ *Id.*

¹² Upon a conviction of a class A-1 drug felony the minimum sentence permitted under the law is 15 years' imprisonment, and the sentencing judge has the discretion to impose a minimum term of up to 25 years. N.Y. PENAL LAW § 70.00-3(a)(i) (McKinney Supp. 1974). The mandatory minimum upon conviction of an A-2 felony is from six to eight and one-third years' imprisonment. *Id.* § 70.00-3(a)(ii). The mandatory minimum in the case of an A-3 drug felony is one year, and the sentencing judge may impose a minimum not exceeding eight and one-third years. *Id.* at § 70.00-3(a)(iii).

offenders.¹³ Furthermore, although the sale of narcotic drugs is almost universally a felony, New York is one of only four jurisdictions that dictate the imposition of a life sentence.¹⁴ Moreover, the mandatory minimum sentence of fifteen years (with an option of imposing a minimum of twenty-five years) accompanying the conviction of an A-1 felony, the most serious classification, exceeds that of any other state that provides life sentences for drug offenses.¹⁵ Only the laws relating to marijuana remain substantially as they were prior to the 1973 legislation, permitting considerable judicial leniency for relatively minor offenses such as possession of small quantities for "personal use."¹⁶

New York's new laws have stimulated a wideranging debate, both philosophical and legal, concerning their criminological utility and ethical propriety. A comprehensive appraisal of the constitutionality or the efficacy of these laws is beyond the scope of this Note. This Note will, instead, examine the laws from the perspective of the prohibition against "cruel and unusual" punishment found in the eighth amendment to the United States Constitution.¹⁷ The eighth amendment's prohibition against the imposition of such punishment by the federal government is made applicable to the states through the due process clause of the fourteenth amendment.¹⁸ The proscription limits not only the mode of permissible punishment, but also the character of the substantive conduct that may become the object of criminal sanctions, as well as the extent or degree of those sanctions.¹⁹

¹³ NATIONAL COMM'N ON MARIHUANA AND DRUG ABUSE, SECOND REPORT, DRUG USE IN AMERICA: PROBLEM IN PERSPECTIVE, App., vol. 3, at 244 (1973) [hereinafter cited as SECOND REPORT].

¹⁴ California, Connecticut, and Louisiana additionally mandate life imprisonment. See text accompanying notes 178-81 *infra*.

¹⁵ *Id.*

¹⁶ A. ROSENBLATT, NEW YORK'S NEW DRUG LAWS AND SENTENCING STATUTES 37-39 (1973). Penalties provided for mere possession range from not more than one year's imprisonment, with the availability of a conditional discharge for the first offense (possession of less than one-quarter ounce), to a maximum term of 5 to 15 years for possession of 100 or more cigarettes containing marijuana. N.Y. PENAL LAW §§ 220.03, .09 (McKinney Supp. 1974). This penalty structure is similar to that of a majority of other jurisdictions in the nation, almost all of which presently classify possession of small quantities of marijuana for "personal use" as a misdemeanor and provide for the possibility of conditional discharge in the case of a first offense. SECOND REPORT, App., vol. 3, at 244.

¹⁷ "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

¹⁸ Robinson v. California, 370 U.S. 660, 666 (1962); cf. Powell v. Texas, 392 U.S. 514, 531 (1968).

¹⁹ See, e.g., Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071 (1964); Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24

A bifurcated assault on the constitutionality of the New York drug laws may be mounted under the eighth amendment. The first approach would question the validity of the entire concept of imposing criminal penalties upon drug-dependent persons for drug and drug-related offenses; the second approach would focus upon the severity of the penalty provisions in general. The purpose of this Note is to examine both approaches in order to determine whether, under present interpretations of the eighth amendment, the New York drug laws can withstand such an attack.

II

COMPULSIVE BEHAVIOR AND *Robinson-Powell*

Since the Supreme Court's 1962 decision in *Robinson v. California*,²⁰ there has been little doubt that the eighth amendment limits the type of conduct over which the criminal law may exercise dominion. However, *Robinson* left unresolved, and subsequent Supreme Court decisions have failed to delineate, the exact scope of those limitations.

Robinson was convicted under a California statute making it a crime to be addicted to the use of narcotics.²¹ In reversing the conviction, the Supreme Court, adopting the position that narcotics addiction is a disease and in itself involves no criminal conduct, declared that a law making criminal the status of being an addict violated the eighth amendment.²² Although the Court suggested

STAN. L. REV. 838 (1972); Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966); Note, *Effect of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U.L. REV. 846 (1961).

²⁰ 370 U.S. 660 (1962).

²¹ The statute provided:

No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics.

Stats. 1957, c. 1064, p. 2343, § 1 (repealed 1972).

²² Justice Stewart delivered the opinion of the Court, stating:

It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

370 U.S. at 666. The Court noted that the California statute must be considered within this same category:

We hold that a state law which imprisons a person thus afflicted [being addicted to

that state laws punishing acts such as the acquisition or possession of narcotics would be constitutionally permissible,²³ a dissent by Justice White pointed out the illogical character of this conclusion. Justice White observed that if the state could not punish an individual for having a compulsion to consume narcotics, it would make no sense to penalize him for yielding to that compulsion: to punish an addict for his acquisition and use of drugs is, in effect, to punish him for a compulsion symptomatic of the disease.²⁴

In *Powell v. Texas*,²⁵ a 1968 case dealing with a constitutional challenge to a Texas public intoxication statute, the Court made an effort to clarify the rationale of *Robinson*. Justice Marshall, writing for a plurality of the court, gave *Robinson* a narrow reading which de-emphasized the concept of addiction as an irresistible compulsion and focused upon the absence of an *actus reus*, thus implying that the punishment of an addict would be consistent with the eighth amendment if he engaged in *conduct* in pursuit of his habit, i.e., acquisition of narcotics.²⁶

A dissenting opinion by Justice Fortas, joined by three members of the Court and with which Justice White's concurring opinion substantially agreed, suggested that *Robinson*, in characterizing drug addiction as a disease manifested by an irresistible compulsion to consume narcotics, prohibited punishment of the addict for the crimes of purchase and possession.²⁷ This theory of criminal responsibility, in refusing to permit the imposition of criminal penalties upon an individual for being in a condition he is

drugs] as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment.

Id. at 667.

²³ *Id.* at 664.

²⁴ If it is "cruel and unusual punishment" to convict appellant for addiction, it is difficult to understand why it would be any less offensive to the Fourteenth Amendment to convict him for use on the same evidence of use which proved he was an addict.

Id. at 688.

²⁵ 392 U.S. 514 (1968).

²⁶ The entire thrust of *Robinson's* interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or . . . has committed some *actus reus*.

Id. at 533.

²⁷ *Robinson* stands upon a principal which . . . is the foundation of individual liberty and the cornerstone of the relations between a civilized state and its citizens: Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change.

Id. at 567.

powerless to change, is not without its difficulties.²⁸ As Justice Marshall observed in the plurality opinion, any attempt to limit the defense of drug dependence to the crimes of mere acquisition or possession, as distinguished from the other manifestations of the

²⁸ For discussion of the development and implications of the *Robinson-Powell* rationale, see, e.g., Bonnie & Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry Into the Legal History of American Marijuana Prohibition*, 56 U. VA. L. REV. 971 (1970); Note, *Criminal Law: Demise of "Status-Act" Distinction in Symptomatic Crimes of Narcotic Addiction*, 1970 DUKE L.J. 1053; Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966); 5 TOLEDO L. REV. 388 (1974).

Watson v. United States, 439 F.2d 442 (D.C. Cir. 1970) (en banc), is generally regarded as the fullest judicial development of *Robinson-Powell*. In that case an addict claimed that his prosecution for possession of a certain quantity of heroin, amounting to one-half of his daily requirements, was prohibited under the eighth amendment. Although the case was decided on other grounds, the court stated:

[I]f *Robinson's* deployment of the Eighth Amendment as a barrier to California's making addiction a crime means anything, it must also mean in all logic that (1) Congress either did not intend to expose the non-trafficking addict possessor to criminal punishment, or (2) its effort to do so is as unavailing constitutionally as that of the California legislature.

Id. at 452. Judge McGowan, writing for the court, further observed:

For the future, the addict, whose acquisition and possession of narcotics is solely for his own use and who wishes to defend on these grounds [Eighth Amendment], is surely not at a loss to know how to do so. . . . To the extent that he wishes to assert that the statutes are not to be read as applicable to him, his primary attack should . . . be by a motion to dismiss. Such a motion would presumably make an alternative claim of the constitutional defectiveness, under *Robinson*, of the statutes as applied to him.

Id. at 453.

Shortly thereafter, this drug dependence defense was dealt a death blow in a lengthy opinion by the same court in *United States v. Moore*, 386 F.2d 1139 (D.C. Cir.), *cert. denied*, 414 U.S. 980 (1973), wherein *Robinson* was given the narrow Marshall reading as involving the absence of an *actus reus*. The court concluded that statutes punishing conduct, as distinguished from status, were not within the scope of the eighth amendment prohibition. See *id.* at 1150-52, 1195-98.

The Note in *Harvard Law Review*, *supra*, is particularly perceptive in describing the Pandora's box opened by a *Watson*-type analysis:

Considered in light of an increasingly more sophisticated science of psychiatry, the "status one cannot change" rationale might conceivably yield results antithetical to the criminal law itself. It has been suggested that virtually all criminality may be the result of mental abnormality of some sort. Under this view of *Robinson*, the acceptance of such a position—like the acceptance of philosophical determinism—would lead to virtual abandonment of the criminal law; for the hypothesis upon which any system of criminal law must be founded is that individuals possess free will and are to be held responsible for their acts.

Id. at 654 (footnotes omitted).

Professor Herbert Fingarette has recently inquired into the medical and philosophical foundations of the drug-dependence defense and has concluded that its fundamental assumptions are insupportable. He asserts that an expansive reading of *Robinson*, which would exculpate the addict from criminal liability allegedly attributable to his condition of addiction, cannot be justified because the widespread belief that the addict's behavior is involuntary or compulsive is not sustained by available data. *Addiction and Criminal Responsibility*, 84 YALE L.J. 413, 443-44 (1975).

addict syndrome such as public intoxication, assault, theft, and the sale of narcotics, would be limitation by fiat.²⁹

The New York Court of Appeals was confronted with this dilemma in *People v. Davis*,³⁰ a 1973 case involving a constitutional challenge to the conviction of a narcotic addict for the crimes of possession of a dangerous drug and a hypodermic instrument. In a unanimous opinion the court rejected what it conceded to be a logically persuasive argument based upon the *Robinson-Powell* rationale³¹ and cautioned:

The ramifications of recognizing the asserted cruel and unusual punishment defense, and impliedly the defense of drug dependence, are startling. The difficulty lies in knowing where to stop. The obvious danger is that the defense will be extended to other crimes—robberies, burglaries and the like—which can be shown to arise from the compulsive craving for drugs.³²

The court argued for judicial restraint in this controversial area, preferring to defer to the judgment of the Supreme Court or the state legislature in the establishment of minimum standards of criminal responsibility.³³

It is thus apparent that an approach which questions the imposition of penalties for drug-related offenses upon drug-dependent persons is not likely to be effective as a constitutional challenge to the New York drug laws. Moreover, even if it should prove successful, it would do nothing to alter the character of the penalties to be imposed upon those whose dependence upon, or use of, drugs has not become compulsive. In the absence of a definitive resolution of this issue by the United States Supreme Court—something the Court appears to be resisting³⁴—any hope of successful attack along the eighth amendment route must rely upon a demonstration that the penalty scheme of the statute departs so substantially from that found in other jurisdictions, and

²⁹ 392 U.S. at 534.

³⁰ 33 N.Y.2d 221, 306 N.E.2d 787, 351 N.Y.S.2d 663 (1973), *cert. denied*, 416 U.S. 973 (1974).

³¹ The court observed:

Doubtless, the argument is logically appealing that if an addict cannot, consistent with the Federal and State Constitutions, be punished for being in the status or condition of addiction, he cannot be punished for the acts of possessing for his personal use narcotics and associated instruments . . . which acts are realistically inseparable from the status or condition itself.

Id. at 226, 306 N.E.2d at 790, 351 N.Y.S.2d at 667.

³² *Id.* at 227, 306 N.E.2d at 790, 351 N.Y.S.2d at 668.

³³ *Id.* at 228, 306 N.E.2d at 791, 351 N.Y.S.2d at 668-69.

³⁴ For a collection of cases raising the drug dependence defense, which the Supreme Court has refused to hear, see 5 TOLEDO L. REV. 388, 392 n.24.

is so disproportionate to the nature of the offense, as to be shocking to the conscience.

III

EXCESSIVE PUNISHMENT UNDER THE EIGHTH AMENDMENT

As indicated earlier, the eighth amendment establishes a framework within which the criminal law must function in punishing individuals for engaging in proscribed behavior.³⁵ These parameters are neither clearly delineated nor immutable, but draw their character from "the evolving standards of decency that mark the progress of a maturing society."³⁶

It was first observed in 1892 by Justice Field, in a frequently cited dissenting opinion in *O'Neil v. Vermont*,³⁷ that sentences that are excessive—*i.e.*, where the penalty imposed for an offense exceeds all conceptions of proportionality when measured against the social disutility of the conduct toward which it is directed—are violative of the eighth amendment.³⁸ Eighteen years later, this dissent was quoted with approval in the landmark decision in *Weems v. United States*.³⁹ The case involved a Philippine public official sentenced to fifteen years of hard labor for having falsified certain official government records. The constitutional provision at issue was the cruel and unusual punishment prohibition of the Philippine bill of rights,⁴⁰ but the Court noted that it was substantially identical to the eighth amendment to the United States Constitution. Although certain unusual features of the punishment in question in *Weems* could arguably be regarded as inherently cruel,⁴¹ the scope of the decision was considerably broader. The Court invalidated the sentence on the basis of its conclusion that the punishment, when measured against the nature of the crime

³⁵ See notes 18-19 and accompanying text *supra*.

³⁶ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

³⁷ 144 U.S. 323 (1892).

³⁸ The inhibition is directed, not only against punishments of the character mentioned [relating to mode], but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged. The whole inhibition is against that which is excessive

Id. at 339-40.

³⁹ 217 U.S. 349 (1910).

⁴⁰ Act of July 1, 1902, c. 1369, § 5, 32 Stat. 691 (repealed 1966).

⁴¹ Section 56 of the Penal Code of the Philippine Islands declared that the punishment should include, *inter alia*, hard, painful labor, constant enchainment, life-long surveillance following discharge from custody, and permanent loss of rights of property disposition. 217 U.S. at 363-64.

and the character of the offender, was clearly excessive, observing that "it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense."⁴²

That the Supreme Court in *Weems* enunciated a fundamental principle of American criminal jurisprudence seems indisputable.⁴³ Achieving unanimity in the development of standards by which proportionality is to be gauged is, however, quite another matter.

If the eighth amendment is to be applied to claims of excessive punishment with precision and equality, manifestly the subjective conceptions of individual judges concerning contemporary standards of decency cannot supply the constitutional yardstick by which the permissible length of a prison term is to be measured. It is essential that objective standards of judicial review be developed. The search for such objective constitutional standards, which had its genesis in *Weems* some sixty years ago, has been most clearly articulated only during the present decade.

In recent years the eighth amendment has undergone a process of rationalization that has transformed it from what was initially a narrow prohibition against forms of punishment offensive to contemporary ethical norms into what is essentially a doctrine of substantive due process tempered by decency and a respect for the dignity of the individual. As a result of this process, the prohibition against cruel and unusual punishment has acquired a contemporary significance and is likely to become even more important in the future.

A. *The Offense, The Offender, and a Penological Analysis of The Punishment*

Several fundamental considerations recurrently emerge from the case law as bearing upon the proportionality of a given punishment to a particular crime.⁴⁴ The courts commonly appraise

⁴² 217 U.S. at 367.

⁴³ But see Packer, *supra* note 19, at 1074, where it is argued that *Weems* is the only Supreme Court decision which "comes even close to upsetting a conviction on this ground." Professor Packer regards the case as "much closer to the conventional view that cruel and unusual punishment is a matter of mode not proportion than it is usually thought to be." *Id.* at 1075 (footnote omitted).

⁴⁴ The seminal case in this area of the law is probably *Weems v. United States*, 217 U.S. 349 (1910). See notes 39-43 and accompanying text *supra*. The Supreme Court of California has developed the most systematic procedure for an evaluation of constitutional challenges under the prohibition against cruel and unusual punishment. One of the most prominent cases in which this analysis was employed is *In re Lynch*, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972), wherein the court invalidated the state's recidivist statute that mandated the imposition of a life sentence upon a defendant convicted of a second offense of indecent exposure. The court developed a tripartite test of proportionality: (1) examining

the nature of the criminal conduct involved and the character of the individual offender in an attempt to reach some conclusion concerning the magnitude of the social danger each represents. Consideration is also given to the degree of punishment provided for the offense, its penological ramifications, and the possible objectives of the legislature in establishing such a penalty.⁴⁵

1. *The Offense: Some Perspective*

High on the list of legislative priorities in the determination of the penological treatment to be accorded an offense is the danger to society presented by the proscribed conduct. The National Commission on Marihuana and Drug Abuse concluded from its research that "[a]ll potent psychoactive drugs have been associated with crime, delinquency, heightened aggression, mental illness, reckless or negligent operation of a motor vehicle or other dangerous machinery and other forms of antisocial behavior."⁴⁶ Thus, there can be no doubt that a legislature manifests a legitimate concern when it attempts to subject the use of drugs to stringent control. It is only when the legislative response exceeds the scope of its authority that judicial intervention is warranted.

Ranked by the National Commission in descending order of their propensity to produce violent behavior are the following drugs: alcohol,⁴⁷ stimulants,⁴⁸ hallucinogens,⁴⁹ and opiates.⁵⁰ Iron-

"the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society"; (2) comparing "the challenged penalty with the punishments prescribed in the *same jurisdiction* for *different offenses* which . . . must be deemed more serious"; and (3) comparing "the challenged penalty with the punishments prescribed for the *same offense* in *other jurisdictions* having an identical or similar constitutional provision." *Id.* at 425-27, 503 P.2d at 930-32, 105 Cal. Rptr. at 226-28 (emphasis in original). The California court only recently reaffirmed its commitment to this approach, and refined its analysis in *In re Foss*, 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974). The court's approach forms the basis for the mode of analysis used in this Note. See also *Furman v. Georgia*, 408 U.S. 238 (1972); *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974); *Ralph v. Warden*, 438 F.2d 786 (4th Cir. 1970), *cert. denied*, 408 U.S. 942 (1972); *State v. Ward*, 57 N.J. 75, 270 A.2d 1 (1970).

⁴⁵ See, e.g., *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974); *In re Foss*, 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974); *Workman v. Commonwealth*, 429 S.W.2d 374 (Ky. 1968); *People v. Lorentzen*, 387 Mich. 167, 194 N.W.2d 827 (1972).

⁴⁶ SECOND REPORT, *supra* note 13, at 156.

⁴⁷ "Alcohol, the most commonly used drug, is strongly associated with violent crime and with reckless and negligent operation of motor vehicles." *Id.* at 165.

⁴⁸ Some evidence suggests that stimulants tend to be related to assaultive behavior, but it is presently inconclusive. See *id.*

⁴⁹ "Except in relatively rare instances generally related to drug-induced panic and toxic reactions, users of hallucinogens, . . . are not inclined toward assaultive criminal behavior." *Id.*

⁵⁰ Use of opiates, especially heroin, is associated with acquisitive crimes such as

ically, the penalties imposed under New York law for abuse of

burglary and shoplifting, ordinarily committed for the purpose of securing money to support dependence. Assaultive offenses are significantly less likely to be committed by these opiate users, especially in comparison with users of alcohol, amphetamines and barbiturates.

Id.

There is substantial support for the conclusion that the proscription of these substances, accompanied by severe criminal penalties, actually results in an increase in acquisitive crimes, since free market mechanisms operate to inflate the price of narcotics to such an extent that addicts are compelled to engage in illicit conduct to maintain their dependence. Some insight into the dimensions of the problem may be gained by performing a few simple calculations: "[R]ecent estimates of the daily cost of supporting a [heroin] habit have ranged from \$20 to \$100, fluctuating according to the availability and location." *Id.* at 174. Computed on an annual basis, this ranges from \$7,300 to \$36,500. Combined with the fact that the products of burglaries and robberies commonly can be sold on the blackmarket for only 20 to 40 percent of actual value, the addict "may be expected to steal in property an amount ranging from \$25,000 to \$50,000 per year." *Id.* at 175. On the upper end of the scale, the maximum sum could reach more than \$150,000 per year. Few heroin addicts are engaged in legitimate occupations that produce such income.

Greenberg and Adler provide additional support for the proposition that drug dependence is usually productive of *nonviolent* acquisitive crime:

[L]eaving aside the sensational, irresponsible, often politically motivated attempts to attribute all manner of heinous crimes to addicts, much of the scholarly literature concludes that violent crimes are rarely committed by individuals while addicted because of the calming effects of the opiates. . . . For instance, in a widely referenced report published by the New York City Police Department in 1966, while 27 percent of all arrests were for felonious assault and 21 percent for burglary, among all addict arrests only 5 percent were for felonious assault while 41 percent were for burglary. These findings have been replicated in the official arrest records of several large cities.

Greenberg & Adler, *Crime and Addiction: An Empirical Analysis of the Literature, 1920-1973*, 3 CONTEMP. DRUG 221, 244 (1974) (citations omitted).

The inflammatory rhetoric alluded to by Greenberg and Adler inhibits reasoned discussion and thwarts objective analysis of the problem of drug abuse. The Rockefeller Message exemplifies this kind of counterproductive language: "The hard drug pusher destroys lives just as surely as and far more cruelly than a cold-blooded killer." *Message to the Legislature*, *supra* note 1, at 19.

Even less justifiable is the appearance of such hyperbole in judicial commentary. A flagrant example is to be found in *People v. Venable*, 46 App. Div. 2d 73, 361 N.Y.S.2d 398 (3d Dep't 1974):

It is urged upon the court that the crime of simply transferring . . . hard drugs from one person to another is not of such a grade of normal [*sic*] turpitude or depravity as "assassins, homicidal incendiaries and kidnappers." . . . [T]he insidious effect of hard drugs has been reasonably shown . . . to exceed the moral turpitude of those classes of criminals by ultimately being a prior contributing factor in many instances to those particular crimes.

Id. at 80, 361 N.Y.S.2d at 406-07. Thus, the court clearly implied that there exists a demonstrable causal relationship between trafficking in hard drugs and the commission of arson, murder, and kidnapping—a proposition wholly lacking in statistical support.

A startling counterpoint to the discouraging American experience is provided by the British system of opiate narcotic treatment.

[A] licensed dependent can obtain high-quality inexpensive heroin, methadone, or morphine from clinics . . . to maintain dependence. . . . There is very little illicit traffic in Great Britain. There is very little crime associated with British dependents.

A substantial percentage of English dependents hold regular employment and the spread of heroin dependence has been contained.

those same drugs are almost precisely inversely proportional to the degree of social danger they represent.⁵¹

The extent of the disproportionality in the treatment of those who violate laws relating to the control of narcotics, hallucinogens, and stimulants stands in sharp relief when contrasted with the treatment of those who abuse alcohol. According to the Commission report, "in the case of homicide and other assaultive offenses, alcohol was used by at least half of the offenders directly prior to the crime," and alcohol was also "reported as a factor in 67% of the sexual crimes against children and 39% of the sexually aggressive acts against women."⁵² Another recent study issued an even harsher indictment of alcohol, noting that it

not only produces a serious dependence and does inevitable organic damage even to the relatively light user, but its use is also intimately and causally related to homicide, other crimes of violence to persons and property, more than half of all arrests, suicide, traffic death and injury, loss of work and impairment of social relationships, accidents and mental illness.⁵³

Given the unrivaled potential for social harm which accompanies the use of this "drug," one would expect its abuse to be attended by criminal sanctions paralleling or exceeding those for other drug offenses. Again, ironically, alcohol abuse does not even appear in the list of Article 220 drug offenses.⁵⁴ Instead, its availability is only minimally controlled and its merchandising is the object of a major commercial industry. It is the constitutional duty of the judiciary to insure that a measure of proportionality inheres in the criminal law, and such a comparative analysis recognizing this inconsistency of treatment is necessary to its deliberations.

At least one commentator has urged that since stimulants, hallucinogens, and to a considerable extent even narcotics, have little impact, due to their pharmacological properties, beyond their effect upon the biological system of the individual consumer, any criminal sanction is inappropriate. He asserts that "[a]t best

Israel & Denardis, *The Irrationality of a Law Enforcement Approach to Opiate Narcotics*, 50 J. URB. L. 631, 678 (1973) (footnotes omitted).

⁵¹ See note 12 *supra*. Only narcotic drugs fall within the A-1 classification. N.Y. PENAL LAW § 220.21 (McKinney Supp. 1974). A-2 felonies include abuse of narcotics, hallucinogens, and stimulants. *Id.* § 220.18. Procurement of alcoholic beverages for a minor is a misdemeanor punishable by a fine of not more than \$50, or by imprisonment for not more than five days, or both. N.Y. ALCO. BEV. CONTROL LAW § 65-a (McKinney 1970).

⁵² SECOND REPORT, *supra* note 13, at 157-58 (citations omitted).

⁵³ Israel & Denardis, *supra* note 50, at 659.

⁵⁴ See N.Y. ALCO. BEV. CONTROL LAW § 65 (McKinney 1970).

the proponents of severe penalties can argue that the crime involves moral turpitude because [the user] is being reckless or grossly negligent of the safety of himself and other citizens."⁵⁵ Under this view, even conceding that the issue of criminal treatment is a legislative one not inherently implicating constitutional considerations, the author contends that penal sanctions "must be employed in a manner which recognizes drug use as comparable to lesser crimes, such as speeding, prostitution, drunkenness, jaywalking, and riding a motorcycle without a helmet."⁵⁶

There remains considerable controversy over the precise criminogenic consequences of drug consumption, and legislative decisions in this uncertain area should be accorded wide latitude. Legislative prerogative cannot, however, be constitutionally exercised with total disdain for contemporary scientific conclusions that, with the exception of alcohol, drug use is primarily anti-social and/or self-injurious and is only indirectly productive of criminal activity—largely as a result of the economic consequences of drug prohibition itself.⁵⁷

2. *The Punishment*

The New York penalty scheme, it will readily be observed, does evidence an intention to graduate the punishment according to the quantity of the drug involved.⁵⁸ This graduated scheme, which appears to reflect the legislature's assumption that the severity of the offense is directly proportional to the quantity of the prohibited substance possessed, is open to criticism as being overly simplistic in its rationale. The harshest criticism of the legislation, however, has been directed not at the concept of graduation, but at

⁵⁵ Wheeler, *supra* note 19, at 863.

⁵⁶ *Id.* at 864.

⁵⁷ *Id.* at 863.

⁵⁸ See generally N.Y. PENAL LAW § 220 (McKinney Supp. 1974).

For example, penalties for possession of narcotics range from class A misdemeanor (less than 0.5 oz.) to class A-1 felony (2 oz. or more). Similarly, possession of narcotic preparations is classified anywhere from an A misdemeanor (less than 0.5 oz.) to a B felony (2 oz. or more). Possession of LSD ranges from an A misdemeanor (less than 1 mg.) to A-2 felony (25 mg. or more), as does possession of hallucinogens (less than 25 mg. to 625 mg. or more), hallucinogenic substances (less than 1 g. to 25 g. or more), and stimulants (less than 1 g. to 10 g. or more).

With the exception of a catch-all section providing a D felony penalty with no limitation as to quantity, possession-with-intention-to-sell crimes are uniformly A-3 felonies.

Sale of narcotic drugs ranges from A-3 (less than 0.125 oz.) to A-1 (1 oz. or more) felony classification. Sale of LSD (less than 1 mg. to 5 mg. or more), methamphetamines (less than 0.125 oz. to 0.5 oz. or more), and hallucinogens (less than 25 mg. to 125 mg. or more) ranges from D felony to A-2 felony.

its mandatory sentences,⁵⁹ particularly the mandatory life sentence accompanying conviction of a class A felony.⁶⁰ It is this aspect of the law upon which the eighth amendment debate focuses.

The courts have developed two conflicting approaches to the application of the eighth amendment to claims of excessive punishment when indeterminate sentences⁶¹ are involved. The California Supreme Court in *In re Lynch*⁶² held that the constitutionality of such a sentence must be judged on the basis of the maximum term allowable, since the prisoner's release prior to serving the full term is solely within the discretion of parole authorities.⁶³ On the other hand, the Supreme Court of Michigan in *People v. Lorentzen*,⁶⁴ confronted with a similar challenge, concluded that the sentence must be judged by the minimum period of service required before the prisoner becomes eligible for parole.⁶⁵

Although the New York Court of Appeals has never addressed the issue in precisely this context, it would appear that the court would concur with the California approach because the prisoner sentenced to an indeterminate term in New York has no absolute right of release until completion of the maximum term. Qualified by the possibility of the discretionary intervention of the parole board after service of the minimum sentence, the indeterminate term of imprisonment is, in effect, a sentence for the maximum term prescribed.⁶⁶ Recently, a New York court at the county level rejected, by implication, the Michigan approach when it commented: "The Court will not sit idly by and justify an unconstitutional deprivation of rights on the ground that an administrative agency may later come along and correct . . . the injustice."⁶⁷

⁵⁹ See, e.g., Signorelli, *supra* note 4; N.Y. Times articles cited note 7 *supra*.

⁶⁰ See note 12 *supra*.

⁶¹ An indeterminate sentence has been defined as "[a] sentence to imprisonment for the maximum period defined by law, subject to termination by the parole board or other agency at any time after service of the minimum period." BLACK'S LAW DICTIONARY 911 (rev. 4th ed. 1968).

⁶² 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

⁶³ *Id.* at 415-19, 503 P.2d at 924-26, 105 Cal. Rptr. at 220-22.

⁶⁴ 387 Mich. 167, 194 N.W.2d 827 (1972).

⁶⁵ *Id.* at 176, 194 N.W.2d at 831, *citing* *People v. Mire*, 173 Mich. 357, 362, 138 N.W. 1066, 1068 (1912).

⁶⁶ See *People v. Washington*, 264 N.Y. 335, 338, 191 N.E. 7, 8 (1934).

⁶⁷ *People v. Mosley*, 78 Misc. 2d 736, 739, 358 N.Y.S.2d 1004, 1008 (Monroe Co. Ct. 1974), *rev'd sub nom.* *People v. McNair*, 46 App. Div. 2d 476, 363 N.Y.S.2d 151 (4th Dep't 1975). With the exception of the *Mosley* court, none of the courts considering the constitutionality of the law have dealt with the issue explicitly. The Third Department, however, implicitly rejected this position when it observed that "[i]t is to be noted that there is no

If the California view were adopted, the court would be required to assess the permissibility of the punishment imposed upon conviction of a class A felony as if the offender had been sentenced to life imprisonment. Conversely, if the indeterminate sentence were judged according to the mandatory minimum period of incarceration required before the prisoner became eligible for parole, the likelihood of invalidation under the eighth amendment would be sharply reduced, except under circumstances where the mandatory minimum sentence in itself was so excessive as to constitute cruel and unusual punishment.

In the case of a class A-1 felony, where the sentencing judge must impose a minimum term of fifteen years, and may elect up to a twenty-five year minimum, the approach employed would be of lesser significance than in the case of either a class A-2 or A-3 felony where the mandatory minimums range from six to eight and one-third years and from one to eight and one-third years respectively. Notwithstanding the availability of differing minimum sentences, in each of the above instances the prisoner has no constitutional right to release from prison, *ever*: if his application for parole is denied in accordance with the relevant provisions of the correction law, he must serve a life sentence.

Indeterminate sentences with mandatory minimums and maximums such as those prescribed for class A felonies under the New York Penal Law, although increasingly regarded with disfavor in some quarters,⁶⁸ have widely been upheld against eighth

reason to believe that any but the most hardened anti-social . . . individuals will actually be incarcerated for life." *People v. Venable*, 46 App. Div. 2d 73, 77, 361 N.Y.S.2d 398, 404 (3d Dep't 1974).

Mosley, McNair, Venable, and *People v. Broadie*, 45 App. Div. 2d 649, 360 N.Y.S.2d 906 (2d Dep't 1974), were among eight cases that raise a constitutional challenge to the law argued before the Court of Appeals on March 24, 1975, N.Y.L.J., March 13, 1975, at 7, col. 6. During the marathon session, lasting four hours, the primary focus of the attack was upon allegations that the mandatory life sentences violated the eighth amendment prohibition against cruel and unusual punishment. The court is expected to render a decision on the issue by early July. N.Y. Times, March 25, 1975, at 38, col. 6.

Parole may be viewed as a conditional mitigation of the full term which would otherwise be served by permitting a "constructive incarceration" of those who are no longer regarded as sufficiently dangerous to society to warrant actual confinement. See *Hardy v. Warden of Queens House of Detention for Men*, 56 Misc. 2d 332, 334, 288 N.Y.S.2d 541, 543 (Sup. Ct. Queens Co. 1968).

⁶⁸ The National Commission on Reform of Federal Criminal Laws was highly critical of the concept of mandatory minimum sentences, stating flatly that mandatory minimum penalties are clearly undesirable. While mandatory minimum penalties and restrictions on probation and parole are defended as deterrents, . . . studies point out that, as they actually operate, the certainty of punishment they supposedly offer is illusory. . . .

Another argument in favor of mandatory minimum sentences in narcotics

amendment challenges.⁶⁹ On the other hand, they have, although with less frequency, been declared unconstitutional both *per se* and as applied to an individual defendant or class of defendants when the sentencing statute was not invalid on its face.⁷⁰ Thus, in each case, the court must determine whether the punishment imposed is so disproportionate to the crime committed by the offender as to be degrading to human dignity and shocking to a balanced sense of justice.⁷¹ A conclusion on this issue cannot be reached without taking into consideration the character of the defendant, the circumstances surrounding his conduct, the nature of the crime itself, and the interests of society in discouraging and punishing such behavior.

The most frequently articulated objection to such sentences is their total failure to acknowledge that there exist differences among individual defendants, especially with regard to rehabilita-

cases in particular is that they provide leverage, which will induce a suspect to cooperate with law enforcement. It is submitted, however, that, if he fails to cooperate, it is inappropriate to subject him to punishment which is not warranted by the seriousness of his offense, the need to rehabilitate or incapacitate him, or by considerations of deterrence and general prevention.

2 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS, in REPORT ON DRUG OFFENSES 1111-12 (1970).

The ABA Project on Minimum Standards for Criminal Justice reached similar conclusions:

Because there are so many factors in an individual case which cannot be predicted in advance, it is unsound for the legislature to require that the court impose a minimum period of imprisonment which must be served before an offender becomes eligible for parole or for the legislature to prescribe such a minimum term itself.

AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 142 (1967).

The President's Commission on Law Enforcement and Administration of Justice also rejected mandatory minimum sentences:

Within any classification of offenses, differences exist in both the circumstances and nature of the illegal conduct and in the offenders. Mandatory provisions deprive judges and correctional authorities of the ability to base their judgments on the seriousness of the violations and the particular characteristics and potential for rehabilitation of the offender.

PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 11 (1967).

⁶⁹ In *People v. Weiss*, 78 Misc. 2d 792, 358 N.Y.S.2d 267 (Suffolk Co. Ct. 1974), the court rejected the defendant's motion for dismissal of a charge of criminal sale of a controlled substance in the third degree on the ground that the sentencing statute provided a punishment which was cruel and unusual. The court noted that "[f]ederal courts across the breadth of the nation have upheld mandatory minimum terms of greater duration." *Id.* at 794, 358 N.Y.S.2d at 270. The opinion cited a series of recent federal cases sustaining minimum mandatory sentences ranging from five to ten years for a variety of drug crimes.

⁷⁰ See, e.g., Annot., 33 A.L.R.3d 335, 363 (1970).

⁷¹ *Id.* See also note 44 and accompanying text *supra*.

tive potential, and variations in the circumstances of the particular offense which are significant factors in evaluating the degree of danger to society. Not only has the legislature failed to provide for these differences in the penalty scheme, but it has also precluded, to a considerable extent, prosecutorial, judicial, or correctional authorities from taking cognizance of these factors in tailoring punishments to individual cases.

Commenting on the sentencing provisions of the New York legislation, Judge Ernest Signorelli of the Suffolk County Court observed:

In my judgment, an inherent potential for injustice is built into these laws by placing the judge in a straitjacket wherein he is deprived of the discretion to evaluate each case on its own merits and be merciful or harsh, as the particular case may warrant.⁷²

A similar concern was echoed by Judge Andrew Celli in *People v. Mosley*,⁷³ a recent New York case declaring the mandatory maximum life term for the commission of an A-3 drug felony (sale of a controlled substance in the third degree) violative of the eighth amendment. Judge Celli's analytical model was premised on *In re Lynch*,⁷⁴ and his objections to the sentence were similar:

The Court is not permitted to take into consideration the quantity of narcotic sold not allowed to consider the nature of the transaction the relationship of the parties nor the motivation of sale nor the seller's status in the narcotic distribution system Life imprisonment is required in all cases, and in all cases the law thus presumes the worst.⁷⁵

In concluding that the law offended the conscience of the court "beyond a reasonable doubt," Judge Celli further noted that the court

is not allowed to consider the status of the buyer, whether addict or non-addict. Nor may it consider the qualities of the offender, whether young or old, family man or not, high or low rehabilitative potential, value or potential value to society.⁷⁶

The essence of the *Mosley* opinion was that the failure of the legislature to establish a rationally graduated penalty structure which would permit the court to consider these individualized

⁷² Signorelli, *supra* note 4, at 18.

⁷³ 78 Misc. 2d 736, 358 N.Y.S.2d 1004 (Monroe Co. Ct. 1974), *rev'd sub nom.*, *People v. McNair*, 46 App. Div. 2d 476, 363 N.Y.S.2d 151 (4th Dep't 1975).

⁷⁴ 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972). See note 44 *supra*.

⁷⁵ 78 Misc. 2d at 739-40, 358 N.Y.S.2d at 1008.

⁷⁶ *Id.* at 740, 358 N.Y.S.2d at 1008-09.

factors militated strongly against a finding of proportionality of punishment to crime. This view has been explicitly repudiated by the New York courts subsequently considering the same issues.⁷⁷

In *People v. Broadie*,⁷⁸ the Second Department upheld the imposition of a life sentence with a minimum term of one year upon a twenty-four-year-old first offender for the sale of 2.25 ounces of cocaine. The court acknowledged the legislation as inherently harsh and even unjust, but concluded that the "sentencing provisions of the new drug law represent [a] permissible exercise of legislative power and are constitutional."⁷⁹ The court emphasized the deleterious impact of drug trafficking upon the community and concluded that

[b]ased upon the evils which the Governor and the Legislature found to be inherent in the use and sale of narcotics and related substances, punishment of imprisonment for life . . . may not as a matter of law be held to be so severe as to constitute cruel and unusual punishment.⁸⁰

The test of proportionality supported by some legal scholars and numerous judicial opinions cited above received no consideration by the court.⁸¹ The familiar litany that legislative acts are accompanied by a presumption of constitutionality was recited and the challenge was almost summarily dismissed.

In *People v. Gardner*,⁸² a more analytical, although no more persuasive, opinion, the Supreme Court of Westchester County sustained the mandatory life sentence provisions of the legislation against a constitutional attack. The court noted that the defendant's chief complaint was "with the comparative gravity ascribed by the Legislature to the offenses charged . . . and with the severity of penalty fixed therefor."⁸³ The court cited with approval the test of cruel and unusual punishment enunciated by Justice Brennan in *Furman v. Georgia*⁸⁴ and concluded that "the maximum sentence of life imprisonment . . . is neither so inherently severe nor excessive as to violate the Eighth Amendment."⁸⁵ The court further ob-

⁷⁷ It should be noted that the Court of Appeals has recently heard arguments in appeals from several of the lower court cases. See note 67 *supra*.

⁷⁸ 45 App. Div. 2d 649, 360 N.Y.S.2d 906 (2d Dep't 1974).

⁷⁹ *Id.* at 650, 360 N.Y.S.2d at 908.

⁸⁰ *Id.* at 653, 360 N.Y.S.2d at 911.

⁸¹ See, e.g., notes 36-45 *supra*; Wheeler, *supra* note 19.

⁸² 78 Misc. 2d 744, 359 N.Y.S.2d 196 (Sup. Ct. Westchester Co. 1974).

⁸³ *Id.* at 748, 359 N.Y.S.2d at 200.

⁸⁴ 408 U.S. 238, 282 (1972).

⁸⁵ 78 Misc. 2d at 749, 359 N.Y.S.2d at 201.

served that "[t]he mere fact that . . . the Legislature allowed more lenient sentences for offenses deemed by some to represent a greater evil, does not convert the penalties under fire in this case into cruel and inhuman punishments."⁸⁶ It buttressed this conclusion with a quotation from *Howard v. Fleming*⁸⁷ in which the United States Supreme Court, in upholding disparate sentences imposed upon three defendants all convicted of the same offense, observed that "[u]ndue leniency in one case does not transform a reasonable punishment in another case to a cruel one."⁸⁸

Furthermore, the *Gardner* court supported its exercise of restraint with language from the United States Supreme Court's opinion in *Pennsylvania ex rel. Sullivan v. Ashe*:⁸⁹ "The comparative gravity of criminal offenses and whether their consequences are more or less injurious are matters for [legislative] determination."⁹⁰ Although this statement is correct, if the eighth amendment is to have any meaning at all, it must mean that the legislature is not imbued with unbounded discretion in the prescription of punishments for criminal behavior. Immediately following the sentence quoted above, the *Sullivan* Court commented that

[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.⁹¹

It was the contention of the defendant in *Gardner* that the mandatory sentencing provisions of the law preclude the court from considering precisely these qualities of the offender.⁹²

The Third Department, in *People v. Venable*,⁹³ also upheld the

⁸⁶ *Id.* at 749-50, 359 N.Y.S.2d at 202.

⁸⁷ 191 U.S. 126 (1903).

⁸⁸ *Id.* at 136. Reliance on this language is misleading for the important reason that the proportionality argument advanced in this Note rests not upon the demonstration of "undue leniency in one case," but upon the conclusion that the penal law, in its entirety, manifests the legislature's assessment of the relative severity of the various criminal offenses. Thus, the comparative approach contrasts the particular punishment under scrutiny with the pattern of legislative priorities inferable from an objective appraisal of the entire sentencing scheme reflected in the penal code and not with what might be regarded as an unduly lenient sentence provided for any specific crime or imposed by an individual judge in a particular case. *Undue severity* of a punishment, evidenced by substantial and unjustifiable departure from the norms of civilized society, is the constitutional litmus to be employed in applying the eighth amendment to claims of excessive punishment.

⁸⁹ 302 U.S. 51 (1937).

⁹⁰ *Id.* at 55.

⁹¹ *Id.*

⁹² 78 Misc. 2d at 747-48, 359 N.Y.S.2d at 199-200.

⁹³ 46 App. Div. 2d 73, 361 N.Y.S.2d 398 (3d Dep't 1974).

law against the defendant's contention that the sentence accompanying a conviction of a class A drug felony was violative of the eighth amendment. The court relied heavily upon the opinion of Justice Quinn in *Gardner* and the apparent intractability of the drug problem in sustaining the law as a permissible exercise of legislative power.⁹⁴

Although legislative judgments concerning the appropriate disposition of offenders should be accorded the highest respect, such deference ought not be invoked to justify abdication of the judiciary's responsibility to ensure that constitutional boundaries are not transgressed in the legislative process. But in their placing emphasis upon legislative prerogative and in their superficial application of tests of constitutionality, the *Gardner* and *Venable* courts appear to have effectively precluded themselves from exercising full review of the legislature's actions.

3. Penological Purposes

The criminal law encompasses a variety of theories of punishment, chief among them incapacitation, deterrence, retribution, rehabilitation, and education; but it has as its singular objective the prevention of antisocial conduct.⁹⁵ The dominant emphasis of the penal law in recent years has been upon rehabilitation as "reflected in the increased use of such devices of modern penology as the indeterminate sentence, the presentence investigation, probation and parole. . . ."⁹⁶ Commenting in 1949 on developments in the philosophy of punishment, the Supreme Court observed in *Williams v. New York*:⁹⁷ "Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."⁹⁸

Although almost all New York penal law is a product of the competitive interaction of the various theories of punishment, Article 220 is unique. In enacting the 1973 drug law, the legislature eschewed contemporary emphasis on rehabilitation; by combining indeterminate life sentences with lengthy mandatory minimum terms, it adopted an approach which emphasized incapacitation and general deterrence in the case of serious drug offenses to the almost total exclusion of rehabilitation.

The penological utility of the indeterminate sentence is commonly regarded as deriving from the great incentive it lays before

⁹⁴ *Id.* at 78-79, 361 N.Y.S.2d at 404.

⁹⁵ W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 5 (1972).

⁹⁶ *Id.* at 25.

⁹⁷ 337 U.S. 241 (1949).

⁹⁸ *Id.* at 248.

the prisoner to undergo rehabilitation in an effort to gain an early release. Subject to the legislatively or judicially imposed minimums and maximums, the correctional authority is generally free to dispense or withhold parole on the basis of its evaluation of the individual offender's progress toward reform. When the indeterminate sentence is combined with lengthy minimum sentences these objectives are frustrated. Regardless of the prisoner's demonstrated rehabilitation or a determination by the parole board that he no longer presents a threat to society, he will remain ineligible for release until the mandatory minimum sentence has been served.⁹⁹

If the need to incapacitate is to be rationally related to the offender's perceived danger to society, the indeterminate sentence—even in the absence of mandatory minimum terms—would seem adequate to achieve this result. The minimum sentence not only contributes nothing to the protection of society, but it also inhibits the operation of the system of incentives the indeterminate sentence is designed to offer.¹⁰⁰ The rationale for the lengthy mandatory minimum sentences must be found elsewhere.

Considerations of deterrence lie at the heart of the sentencing scheme under the new drug law. The statements of Governor Rockefeller, both accompanying the proposal of the legislation and upon signing it into law, emphasize this theme.¹⁰¹ Following his observation that programs of education and rehabilitation had not succeeded in reducing the dimensions of the drug problem in New York, Rockefeller urged the legislature to "create an effective deterrent to the pushing of the broad spectrum of hard drugs."¹⁰²

Although the notion of deterrence rests upon the intuitive assumption that if undesirable consequences are attached to particular forms of behavior the incidence of such conduct will be diminished, there is very little support for the proposition that the assumption is applicable with equal force across the entire spectrum of criminal conduct.¹⁰³ The efficacy of the deterrence philosophy in the area of drug abuse is particularly questionable. In 1967, the President's Commission on Law Enforcement and the

⁹⁹ *In re Foss*, 10 Cal. 3d 910, 923-24, 519 P.2d 1073, 1081, 112 Cal. Rptr. 649, 657 (1974).

¹⁰⁰ *Id.*

¹⁰¹ See *Message to the Legislature*, *supra* note 1, at 17-22; N.Y. Times, May 9, 1973, at 1, col. 1 (Rockefeller characterizing new law as "toughest antidrug program in the nation" and urging vigorous police enforcement and aggressive judicial application to offenders).

¹⁰² *Message to the Legislature*, *supra* note 1, at 18.

¹⁰³ See generally F. ZIMRING & G. HAWKINS, *DETERRENCE* (1973).

Administration of Justice observed that, despite stiffened penalties, "the use of and traffic in [marijuana] appear to be increasing."¹⁰⁴ Commenting specifically on the utility of mandatory sentences, the Commission remarked that "the evidence as to the effects of mandatory minimum sentences is inconclusive,"¹⁰⁵ and therefore favored vesting the sentencing judge with broad discretion.

Other commentators have expressed less reservation. Professor Chambliss has declared that the "evidence . . . suggests that drug addiction . . . is relatively unaffected by the threat or the imposition of punishment."¹⁰⁶ Although some scholars have made a seemingly logical argument that "general deterrence may operate effectively to prevent potential users from becoming addicts,"¹⁰⁷ the empirical evidence available does not support this position. Cautiously citing, among others, a California study concerning the impact of increased criminal penalties on marijuana use, Professors Zimring and Hawkins concluded that "available data do suggest that increases in legislatively provided penalties for major crimes have little impact as a marginal general deterrent in many situations where officials place great faith in such increases."¹⁰⁸

Indeed even the small amount of information available on the effect of New York's own drug law suggests that the initial consequence of the increased penalties was to drive traffic further underground, not to decrease it.¹⁰⁹ Dealers were encouraged to employ fourteen and fifteen year-olds who, because they were under sixteen, were immune from the severe penalties.¹¹⁰ The heightened hazards of dealing forced a further rise in the price of drugs and a concomitant increase in acquisitive crimes.¹¹¹ By December 1973, a mere three months after the law went into effect, the Deputy Chief Inspector of the New York Police Department was able to conclude that "[i]t's returning to what it was before the new law so far as street pushers and the level above them are concerned."¹¹² Although it cannot be concluded with certainty that the operation of the new law has had *no* impact on the flow of illicit

¹⁰⁴ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *supra* note 68, at 11.

¹⁰⁵ *Id.*

¹⁰⁶ Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 WIS. L. REV. 703, 708.

¹⁰⁷ Andenaes, *Deterrence and Specific Offenses*, 38 U. CHI. L. REV. 537, 538 (1971).

¹⁰⁸ F. ZIMRING & G. HAWKINS, *supra* note 103, at 201.

¹⁰⁹ See N.Y. Times, Oct. 8, 1973, at 1, col. 2.

¹¹⁰ *Id.* at 46, col. 1.

¹¹¹ *Id.* at 46, col. 2.

¹¹² N.Y. Times, Dec. 2, 1973, § 4, at 4, col. 4.

drug traffic, any minimal deterrent effect the harsh penalties might have could hardly be considered sufficient to redeem an otherwise excessive penalty structure.

The propensity of legislators confronted with a crime problem to conclude that "the best hope of control lies in 'getting tough' with criminals by increasing penalties" has been observed to be particularly apparent in the area of regulation of dangerous drugs.¹¹³ The attractiveness of this response is enhanced by its simplicity and economy. Its political viability is strengthened by the knowledge that those upon whom the heightened penalties will be visited rarely constitute an important segment of the electorate.¹¹⁴ But this reasoning yields conclusions that wholly disregard the individual and societal costs implicit in an increased level of criminal sanctions. The dysfunctions not perceived by this narrow perspective include the drain on the resources of the prison system by an enlarged inmate population, the moral dilemma posed by the infliction of what might prove to be needless punishment, increased human suffering through the prolonged separation of the inmate from his family, the possibility of less vigorous prosecution and reluctance on the part of judges and juries to convict where severe penalties are involved, and higher administrative costs.¹¹⁵ All of these considerations should be taken into account by a legislature before it makes any significant change in sentencing structures. How seriously the New York legislature weighed these factors is open to question.

B. *Other Crimes in the Same Jurisdiction*

A procedure frequently reflected in opinions which have systematically analyzed eighth amendment objections to the length of legislatively prescribed sentences involves a comparative evaluation of the penalties provided for other crimes of similar seriousness within the same jurisdiction.¹¹⁶ The essence of this comparative

¹¹³ F. ZIMRING & G. HAWKINS, *supra* note 103, at 18.

¹¹⁴ *Id.* at 18-22.

¹¹⁵ *Id.* at 18-22, 66-69.

¹¹⁶ See notes 38-45 and accompanying text *supra*. Although gradation of offenses in the hierarchy of criminal behavior involves certain difficulties arising from the absence of quantifiable comparative criteria and thus inevitably yields conclusions which are broad and imprecise, there is some general agreement that the gravity of criminal conduct is directly related to the frequency and magnitude of concomitant personal injury and/or property damage it produces. For example, assaultive behavior, *i.e.*, that threatening injury to human life, and conduct which involves a high risk of significant impairment of property interests, is commonly regarded as indicative of serious criminal offenses. See, *e.g.*, *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974); *In re Foss*, 10 Cal. 3d 910, 519

technique is a recognition of the principle that offenders committing crimes involving approximately the same degree of social danger should be similarly treated by the criminal justice system.¹¹⁷ Thus,

if the Court finds the apparent dangers of one criminal activity to be substantially less serious than the apparent dangers of crimes carrying equal penalties, or if the Court cannot find a substantial difference between a crime carrying a severe punishment and crimes carrying minor punishments, it must act on that basis to find the challenged punishment disproportionate.¹¹⁸

The rationale for this procedure was succinctly stated by the California Supreme Court in *In re Foss*:¹¹⁹

[T]he comparison between punishments imposed for more serious crimes with the punishment in question is based upon the assumption that although isolated excessive penalties may occasionally be enacted through "honest zeal . . . generated in response to transitory public emotion," the vast majority of punishments may be deemed to have been enacted with due regard for constitutional restraints.¹²⁰

The findings of the National Commission on Marihuana and Drug Abuse offer support for the conclusion that opiates, hallucinogens, and, to a lesser extent, stimulants are not correlated to any significant degree with assaultive behavior.¹²¹ Furthermore, although it is undisputed that opiates tend to produce acquisitive crimes, there is nothing inherent in the pharmacological properties of the drug which makes this condition inevitable.¹²² Notwithstanding these considerations, the wholesale imposition of life sentences on drug offenders represents the harshest and most inflexible

P.2d 1073, 112 Cal. Rptr. 649 (1974); *In re Lynch*, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972); *People v. Lorentzen*, 387 Mich. 167, 194 N.W.2d 827 (1972); accord, NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, *supra* note 68, at 1111-32.

¹¹⁷ For example, in rejecting B felony classification for small scale trafficking in dangerous or abusable drugs, the National Commission observed:

[I]t would be punished on the same level as such offenses as unaggravated kidnapping, unaggravated forcible rape, and unaggravated robbery It is submitted that such treatment is not justified by the risks posed by these drugs [T]he distributor does not act against the wishes of his "victim" but satisfies his "victim's" demand.

NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS, *supra* note 68, at 1113-14.

¹¹⁸ Wheeler, *supra* note 19, at 863.

¹¹⁹ 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974).

¹²⁰ *Id.* at 927, 519 P.2d at 1084, 112 Cal. Rptr. at 660 (Burke, J.).

¹²¹ SECOND REPORT, *supra* note 13, at 164-65.

¹²² See notes 47-53 and accompanying text *supra*.

treatment of any broad class of crimes recognized by the New York Penal Law.¹²³

Aside from the drug offenses which are classified as class A felonies,¹²⁴ only murder in the first and second degrees,¹²⁵ arson in the first degree,¹²⁶ kidnapping in the first degree,¹²⁷ and attempted murder of a police officer are similarly categorized.¹²⁸ However, unlike the latter group of crimes (and the lesser drug crimes), class A drug felonies are subject to a restriction on plea bargaining.¹²⁹ Thus, where an indictment charges the commission of any class A drug crime or an attempt to commit such a felony, the prosecutor's freedom of negotiation is limited to the acceptance of a guilty plea to nothing less than a class A-3 felony, which still carries the mandatory life term. Of course, a person indicted on an A-3 felony charge may not plea bargain to even this limited extent since his charge is irreducible.¹³⁰ There is, however, one instance in which a reduced sentence is available to one charged with an A-3 felony; this occurs when the defendant agrees to actively cooperate in the investigation or prosecution of any Article 220 drug offense.¹³¹

¹²³ The word "broad" is used advisedly. Since Sept. 1, 1974, § 60.06 of the N.Y. Penal Law mandates the imposition of the death penalty upon conviction of the murder of a police or prison officer or any premeditated murder committed by one serving a life sentence.

¹²⁴ See note 12 *supra*.

¹²⁵ N.Y. PENAL LAW §§ 125.27, .25 (McKinney Supp. 1974).

¹²⁶ *Id.* § 150.20.

¹²⁷ *Id.* § 135.25.

¹²⁸ *Id.* § 110.05(1).

¹²⁹ Compare N.Y. CRIM. PRO. LAW § 220.10(6)(a) (McKinney Supp. 1974) with *id.* § 220.10(4).

¹³⁰ N.Y. CRIM. PRO. LAW § 220.10(6)(a) (McKinney Supp. 1974). This provision was attacked as violative of the equal protection clause in *People v. Gardner*, 78 Misc. 2d 744, 359 N.Y.S.2d 196 (Sup. Ct. Westchester Co. 1974). The defendant urged that the restriction unconstitutionally discriminates against a particular class of offenders in that it "infringe[s] upon the rights of the class comprised of those indicted for the commission of A-3 drug offenses." *Id.* at 753, 359 N.Y.S.2d at 205. While noting that the procedure of plea bargaining has become an institutionalized part of the criminal process, the court held that the defendant had no constitutional right to negotiate a plea to anything less than the complete indictment. *Id.* at 754, 359 N.Y.S.2d at 205.

¹³¹ N.Y. PENAL LAW § 65.00(1)(b) (McKinney Supp. 1974). If this alternative is used, the defendant will be paroled for life. *Id.* § 65.00-3(a)(ii).

Referring to this provision, State Senator Chester Straub observed that it "could have been written by the counsel for organized crime." N.Y. Times, May 8, 1973, at 28, col. 7. The Senator was concerned that the judicial process would clearly identify the informer through the distinctive treatment he received, thus marking him for retribution. *Id.*

Although more than 200 persons have been sentenced to life terms of imprisonment and in excess of 2,500 have been indicted upon drug felonies carrying the mandatory life sentence, only seven major crime figures have qualified for lifetime parole under this provision. N.Y. Times, Nov. 10, 1974, at 1, col. 5.

This revised sentencing structure seems especially harsh in light of the fact that murderers, arsonists, and kidnappers are permitted to negotiate pleas while those indicted on class A drug felony charges have no hope of eluding the life sentence except through acquittal.

The laws relating to attempt are similarly skewed against the drug offender. While an attempt to commit murder, arson, or kidnapping is one full felony class below the substantive crime,¹³² attempted commission of a class A drug felony is treated as a felony of the same class as the actual commission of the substantive offense.¹³³ Only an attempted murder of a police officer is accorded similar "same class" treatment.¹³⁴ However, even attempted murder of a police officer, although treated as a class A-1 felony, cannot be punished as severely as the substantive crime. Furthermore, although the parole board, in the usual case, may grant an absolute discharge to any parolee under an indeterminate sentence—even one convicted of the attempted murder of a police officer¹³⁵—prior to the expiration of the full maximum term, the class A drug offender is required to remain on parole for the duration of his life.¹³⁶

A comparison of the sentences provided for class A drug offenses with the treatment of crimes regarded as less serious by the legislature highlights this lack of proportionality. Arson in the second degree,¹³⁷ burglary in the first degree,¹³⁸ kidnapping in the second degree,¹³⁹ manslaughter in the first degree,¹⁴⁰ rape in the first degree,¹⁴¹ and robbery in the first degree¹⁴² are all class B felonies requiring a mandatory indeterminate sentence with a minimum of one year and a maximum of twenty-five years' imprisonment.¹⁴³ Plea bargaining, however, is unbridled and absolute

¹³² N.Y. PENAL LAW § 110.05(4) (McKinney Supp. 1974).

¹³³ *Id.* § 110.05(1)-(3).

¹³⁴ *See* N.Y. PENAL LAW § 110.05-1.

¹³⁵ A person convicted of the attempted murder of a police officer may be unconditionally discharged from his sentence after five years of unrevoked parole. N.Y. CORREC. LAW § 212(8) (McKinney Supp. 1974).

¹³⁶ *Id.*

¹³⁷ N.Y. PENAL LAW § 150.15 (McKinney Supp. 1974).

¹³⁸ *Id.* § 140.30.

¹³⁹ *Id.* § 135.20.

¹⁴⁰ *Id.* § 125.20.

¹⁴¹ *Id.* § 130.35.

¹⁴² *Id.* § 160.15.

¹⁴³ *Id.* §§ 70.00(2)(b), (3).

discharge of sentence is available after a five year period of unrevoked parole.¹⁴⁴

In *People v. Mosley*,¹⁴⁵ the court compared the penalties for drug offenses with the sanctions for what it deemed far more serious crimes to illustrate its conclusion that the drug law's sentencing structure was disproportionate to the point of being unconstitutional:

[A] person who kills intentionally, who causes serious physical injury in the course of a robbery, who rapes a child, who blows up an occupied building, faces a maximum term of 25 years, or a maximum of 30 years for a series of such acts before being imprisoned on any one of them. Although imprisonment is mandatory, no minimum term may be imposed . . . unless the court gives reasons for concluding that the best interest of the public require it because of the nature and circumstances of the crime and of the history and character of the defendant. Such a person will not remain on parole for the rest of his life, nor will he be denied the opportunity to engage in plea bargaining—the traditional means by which the courts mitigate the punishment required by the legislature for a crime when the circumstances of the particular case and the interest of justice require it.¹⁴⁶

In view of the foregoing analysis there can be no doubt that class A drug offenders are treated more harshly than any other class of criminal offenders in the entire penal system. Such treatment is without foundation in logic and without precedent in law.

C. *The Law in Other Jurisdictions: A Measure of Proportionality*

A further judicial technique for determining the constitutionality of punishment schemes is to make an assessment of contemporary legislative trends, with particular regard for model legislation proposals, and a comparison of the penalties provided by the statute under scrutiny with the sentencing provisions in other jurisdictions for substantially similar offenses.¹⁴⁷ This method of assessing the proportionality between crime and punishment finds its justification in the belief that a majority of jurisdictions will have enacted statutes within the parameters of the eighth amendment. If the penalty under scrutiny deviates substantially from the national norm, it might reasonably be concluded that it was the

¹⁴⁴ N.Y. CRIM. PRO. LAW § 220.10(4) (McKinney Supp. 1974); N.Y. CORREC. LAW § 212(8) (McKinney Supp. 1974).

¹⁴⁵ 78 Misc. 2d 736, 358 N.Y.S.2d 1004 (Monroe Co. Ct. 1974).

¹⁴⁶ *Id.* at 741, 358 N.Y.S.2d at 1009-10.

¹⁴⁷ See notes 38-45 and accompanying text *supra*.

product of an overzealous and ill-considered legislative response to a grave social problem.¹⁴⁸ An examination of the status and direction of drug legislation on a nationwide basis is useful not only as a means of highlighting further indications of disproportionality but also as a method for providing some objective measure of the elusive "evolving standards of decency" to which the Supreme Court alluded in *Trop v. Dulles*.¹⁴⁹

A brief comparative evaluation of the sentencing provisions of other jurisdictions clearly demonstrates the relative severity of the New York legislation. For example, the modal punishment for the possession of narcotics is five years or less,¹⁵⁰ and nine states treat possession of narcotics, irrespective of amount, as a misdemeanor by New York standards, *i.e.*, as punishable by not more than one year in jail.¹⁵¹ In addition, only Illinois and New York provide for life sentences when mere possession is involved. However, in Illinois, the sentence is discretionary with the sentencing judge and is available only when the defendant is found guilty of possessing more than thirty grams (approximately one ounce) of narcotics,¹⁵² while in New York, the life sentence is mandatory whenever the offender is found to possess one ounce or more of narcotics.¹⁵³

The penalties provided for possession of narcotics with intent to sell are almost uniformly higher than those imposed for offences of mere possession.¹⁵⁴ Here, the most common sentence available

¹⁴⁸ See *In re Lynch*, 8 Cal. 3d 410, 427, 503 P.2d 921, 932, 105 Cal. Rptr. 217, 228.

¹⁴⁹ 356 U.S. 86, 100 (1958).

¹⁵⁰ Twenty states provide penalties for possession not exceeding five years: ARK. STAT. ANN. § 82-2104(a) (Supp. 1973); CONN. GEN. STAT. ANN. § 19-481(a) (Supp. 1974); DEL. LAWS, tit. 16 § 4753 (1975); FLA. STAT. ANN. § 893.13(1)(e) (Supp. 1974-75); HAWAII REV. STAT. § 329-42(b) (Supp. 1974); IDAHO CODE § 37-2732(c)(1) (Supp. 1974); KY. REV. STAT. ANN. § 218A.990(5) (Baldwin 1974); MD. ANN. CODE art. 27, § 287(a)(1) (1957); MASS. ANN. LAWS ch. 94C, § 34 (Supp. 1974); MICH. STAT. ANN. § 18.1070(41)(4)(a) (Supp. 1974); MINN. STAT. ANN. § 152.15(2)(1) (Supp. 1974); MISS. CODE ANN. § 41-29-139(d)(1) (Supp. 1974); MONT. REV. CODES ANN. § 54-133c (Supp. 1974); N.J. STAT. ANN. § 24: 21-20(a)(1) (Supp. 1974-75); N.M. STAT. ANN. § 54-11-23(B)(5) (Supp. 1974); N.C. GEN. STAT. § 90-95(d) (Supp. 1974); N.D. CENT. CODE § 19-03.1-23(3) (Supp. 1973); R.I. GEN. LAWS ANN. § 21-28-4.01c(1) (Supp. 1974); S.C. CODE ANN. § 32-1510.49(d)(1) (Supp. 1974); S.D. COMPILED LAWS ANN. § 39-17-95 (Supp. 1974).

¹⁵¹ COLO. REV. STAT. ANN. § 48-1010(6a) (Cum. Supp. 1969); IOWA CODE ANN. § 204.401(3) (Spec. Pamphlet 1974-75); PA. STAT. ANN. tit. 35, § 780-113(b) (Spec. Pamphlet 1974-75); TENN. CODE ANN. § 52-1432(b)(1) (Supp. 1974); UTAH CODE ANN. § 58-37-8(2)(a)(i) (1974); VT. STAT. ANN. tit. 18, c. 84, § 4224(b) (Supp. 1974); W. VA. CODE ANN. § 60A-4-401(c) (Supp. 1974); WIS. STAT. ANN. § 161.41(2r)(a) (1974); WYO. STAT. ANN. § 35-347.31(c) (Supp. 1973).

¹⁵² ILL. ANN. STAT. ch. 56 1/2, § 1402(a)(1) (Smith-Hurd Supp. 1974).

¹⁵³ N.Y. PENAL LAW § 220.18-1 (McKinney Supp. 1974).

¹⁵⁴ It should be noted that many jurisdictions only recognize the two broad categories of possession and sale.

(provided by thirteen states) is a term of imprisonment not exceeding fifteen years.¹⁵⁵ Ten other states provide for sentences not exceeding ten years' imprisonment.¹⁵⁶ Seven more states permit a maximum term of twenty years' imprisonment,¹⁵⁷ and Illinois provides for a term of from one to twenty years in certain instances.¹⁵⁸ Idaho permits the court to establish a penalty of up to life imprisonment,¹⁵⁹ Illinois provides for imprisonment of not less than four years nor more than life when the quantity of narcotics involved exceeds thirty grams,¹⁶⁰ and Indiana permits a sentence of ten years to life for possession of more than ten grams of narcotics with intent to sell.¹⁶¹ Upon conviction for possession of any quantity of narcotics with intent to sell Rhode Island allows the court to fix a sentence of up to life imprisonment¹⁶² while Texas provides for a sentence ranging from five years to life.¹⁶³ Connecticut requires the court to sentence a non-drug dependent person to life with a minimum term of from five to twenty years upon conviction for possession or sale of a quantity of heroin in excess of one ounce.¹⁶⁴ Both Louisiana¹⁶⁵ and New York¹⁶⁶ *mandate* the life sentence upon conviction for possession of any quantity of narcotics with intent to sell.

¹⁵⁵ ARIZ. REV. STAT. ANN. § 36-1002.01(A) (1974); CAL. HEALTH & SAFETY CODE § 11351 (a) (West Supp. 1975); COLO. REV. STAT. ANN. § 48-8-10(3) (Cum. Supp. 1969); MINN. STAT. ANN. § 152.15(1)(1) (Supp. 1974); MISS. CODE ANN. § 41-29-139(a)(1) (Supp. 1974); N.H. REV. STAT. ANN. § 318-B:26(1)(a)(1) (Supp. 1973); N.J. STAT. ANN. § 24:21-19(b)(1) (Supp. 1974-75); PA. STAT. ANN. tit. 35, § 780-113(f)(1) (Spec. Pamphlet 1974-75); S.C. CODE ANN. § 32-1510.49(b)(1) (Supp. 1974); TENN. CODE ANN. § 52-1432(a)(1) (Supp. 1974); UTAH CODE ANN. § 58-37-8(1)(b)(i) (1953); W. VA. CODE ANN. § 60A-4-401(a)(1)(i) (Supp. 1974); WIS. STAT. ANN. § 161.41(1)(a) (1974).

¹⁵⁶ ALASKA STAT. § 17.10.200(a) (1962); CONN. GEN. STAT. ANN. § 19-480(a) (Supp. 1975); IOWA CODE ANN. § 204.401(1)(a) (Supp. 1974-75); KAN. STAT. ANN. § 65-4127(a) (Supp. 1974); MASS. ANN. LAWS ch. 94C, § 32 (Supp. 1974); NEB. REV. STAT. § 28-4125(2) (Supp. 1974); N.C. GEN. STAT. § 90:95(b)(1) (Supp. 1974); N.D. CENT. CODE § 19-03.1-23(1)(a) (Supp. 1973); S.D. COMPILED LAWS ANN. § 39-17-90 (Supp. 1974); VT. STAT. ANN. tit. 18, ch. 84, §§ 4224(e), (f) (Supp. 1974).

¹⁵⁷ CONN. GEN. STAT. ANN. § 19-480a (Supp. 1975); KAN. STAT. ANN. § 65-4127a (Supp. 1974); MASS. ANN. LAWS ch. 94C, § 32 (Supp. 1974); NEB. REV. STAT. § 65-4127(a) 23(1)(a) (Supp. 1973); S.D. COMPILED LAWS ANN. § 39-17-90 (Supp. 1974); VT. STAT. ANN. tit. 18, ch. 84, §§ 4224(e), (f) (Supp. 1974).

¹⁵⁸ ILL. STAT. ANN. 56 1/2, § 1401(b) (Smith-Hurd Supp. 1974).

¹⁵⁹ IDAHO CODE § 37-2732(a)(1)(A) (Supp. 1974).

¹⁶⁰ ILL. ANN. STAT. ch. 56 1/2, § 1401(a)(1) (Smith-Hurd Supp. 1974).

¹⁶¹ IND. ANN. STAT. § 10-3561(a)(1)(i) (Burns Supp. 1974).

¹⁶² R.I. GEN. LAWS ANN. § 21-28-4.01A(1) (Supp. 1974).

¹⁶³ TEXAS REV. CIV. STAT. ANN. art. 4476-15, § 4.03(b)(1) (Cum. Supp. 1974-75).

¹⁶⁴ CONN. GEN. STAT. ANN. § 19-480a(a) (Supp. 1975).

¹⁶⁵ LA. REV. STAT. tit. 40, § 966(B)(1) (West Supp. 1975).

¹⁶⁶ N.Y. PENAL LAW § 220.16-1 (McKinney Supp. 1974).

In the majority of states penalties for the sale of narcotic drugs are somewhat higher than those for either possession or possession with intent to sell. Every jurisdiction treats the sale of narcotics as a felony by New York standards. Twelve states provide for a maximum term of imprisonment not to exceed ten years,¹⁶⁷ twelve permit up to fifteen years,¹⁶⁸ and eight states authorize a maximum of twenty years' imprisonment for the sale of narcotics.¹⁶⁹ Arizona,¹⁷⁰ Idaho,¹⁷¹ Illinois,¹⁷² Indiana,¹⁷³ Missouri,¹⁷⁴ Montana,¹⁷⁵ Rhode Island,¹⁷⁶ and Texas¹⁷⁷ permit the sentencing judge to establish a maximum sentence of any duration up to life, but do not compel it. California mandates an indeterminate term of five years to life,¹⁷⁸ Connecticut establishes an indeterminate term of five years to life for sale of more than one ounce of heroin by a nondrug-dependent person,¹⁷⁹ Louisiana imposes a life sentence with no minimum term,¹⁸⁰ and New York mandates an indeterminate term of life and a minimum ranging from one to twenty-five

¹⁶⁷ ALASKA REV. STAT. ANN. § 17.10.200(a) (1962); ARK. STAT. ANN. § 82-2104(a) (Supp. 1973); HAWAII REV. STAT. tit. 19, § 329-41(b) (Supp. 1974); IOWA CODE ANN. § 204.401(1)(a) (Supp. 1974-75); KY. REV. STAT. ANN. § 218A.990(1) (Baldwin 1973); MASS. ANN. LAWS ch. 94C, § 32 (Supp. 1974); NEB. REV. STAT. § 28-4125(2) (Supp. 1974); N.C. GEN. STAT. § 90-95(b)(1) (Supp. 1974); N.D. CENT. CODE § 19-03.1-23(1)(a) (Supp. 1973); ORE. REV. STAT. § 475.990(2) (Supp. 1974); S.D. CODE § 39-17-90 (Supp. 1974); VT. STAT. ANN. tit. 18, ch. 84, § 4224(g) (Supp. 1974).

¹⁶⁸ ALA. CODE tit. 22, § 258(47)(a) (Supp. 1973); COLO. REV. STAT. ANN. § 48-8-10(1) (Cum. Supp. 1969); MINN. STAT. ANN. § 152.15(1)(1) (Supp. 1974); MISS. CODE ANN. § 41-29-139(a)(1) (Supp. 1975); N.H. REV. STAT. ANN. § 318-B:26 (Supp. 1973); N.J. STAT. ANN. § 24:21-19(b)(1) (Supp. 1974-75); PA. STAT. ANN. tit. 35, § 780-113(f)(1) (Spec. Pamphlet 1974-75); S.C. CODE ANN. § 32-1510.49(b)(1) (Supp. 1974); TENN. CODE ANN. § 52-1432(a)(1); UTAH CODE ANN. § 58-37-8(1)(b)(i) (1974); W. VA. CODE ANN. § 60A-4-401(a)(1)(i) (Supp. 1974); WIS. STAT. ANN. § 161.41(1)(a) (1974).

¹⁶⁹ CONN. GEN. STAT. ANN. § 19-480a(b) (Supp. 1975) (less than one ounce of heroin); KAN. STAT. ANN. § 65-4127a (Supp. 1974); ME. REV. STAT. ANN. tit. 22, § 2362(c) (Supp. 1974-75); MD. ANN. CODE art. 27, § 286(b)(1) (Supp. 1974); MICH. STAT. ANN. § 18.1070(41)(1)(a) (Supp. 1974); NEV. REV. STAT. tit. 40, § 453.321(2)(a)(1) (1973); OKLA. STAT. ANN. tit. 63, § 2-401(B)(1) (1973); WYO. STAT. ANN. § 35-347.31(a)(i) (Supp. 1973).

¹⁷⁰ ARIZ. REV. STAT. ANN. § 36-1002.02(A) (1974).

¹⁷¹ IDAHO CODE § 37.2732(a)(1)(A) (Supp. 1974).

¹⁷² ILL. STAT. ANN. ch. 56 1/2, § 1401(a)(1) (Smith-Hurd Supp. 1974). Under this provision a life sentence is available only when a quantity of narcotics in excess of 30 grams is involved.

¹⁷³ IND. ANN. STAT. § 10-3561(a)(1)(i) (Supp. 1974). This provision applies only if the offense involves more than ten grams of narcotics.

¹⁷⁴ MO. STAT. ANN. tit. 12, § 195.200(4) (Vernon 1969).

¹⁷⁵ MONT. REV. CODES § 54-132(b) (Supp. 1974).

¹⁷⁶ R.I. GEN. LAWS ANN. § 21-28-4.01A(1) (Supp. 1974).

¹⁷⁷ TEXAS REV. CIV. STAT. art. 4476-15, § 4.03(b)(1) (Supp. 1974-75).

¹⁷⁸ CAL. HEALTH & SAFETY CODE § 11352(a) (West Supp. 1975).

¹⁷⁹ CONN. GEN. STAT. ANN. § 19-480a(a) (Supp. 1975).

¹⁸⁰ LA. REV. STAT. ANN. tit. 40, § 966(B)(1) (West Supp. 1975).

years depending upon the quantity of the drug involved and the discretion of the sentencing judge.¹⁸¹

These comparative data readily illustrate the relative harshness of the New York sentencing statutes with respect to narcotics. Further comparative data compiled by the National Commission on Marihuana and Drug Abuse¹⁸² indicate that the New York treatment of possession and sale of hallucinogens and stimulants departs even more substantially from that accorded similar offenses in other jurisdictions.

Because drug penalties are in a constant state of flux, it is difficult to draw any conclusions of permanent significance from a comparison of the New York penalties with those of other jurisdictions. The findings of the National Commission indicate that there presently is no clear *overall* national trend with respect to drug sanctions. While the Commission discerned a strong national trend toward the reduction of possession penalties to misdemeanors and the institution of conditional discharge procedures,¹⁸³ it also concluded that "the trend in the sale area has been as much toward increased penalties as reduced ones."¹⁸⁴ In the years since the Commission's research was concluded there has been a slight increase in the number of states which permit the sentencing judge to impose, in his discretion, a sentence of up to life imprisonment for certain drug offenses, usually involving substantial quantities of prohibited substances.¹⁸⁵ The significant factor which distinguishes these laws from those of New York is that the sentencing authority is permitted to individualize the sentence and is not compelled mindlessly to impose the life sentence. Although few would be likely to dispute the assertion that the life sentence is *sometimes* appropriate in the case of a serious drug offense, it is quite another matter to say, as New York has done, that it is *always* appropriate.

Thus, although it cannot be said that the New York revision is totally antithetical to the current climate of legislative thought, it is clear that the punishments provided under the new drug law are far harsher than those of the vast majority of American jurisdictions. The comparative severity of the New York penalties does not in itself require a finding that the statutory scheme is violative of

¹⁸¹ N.Y. PENAL LAW §§ 220.43, .41-1, .39-1 (McKinney Supp. 1974).

¹⁸² SECOND REPORT, *supra* note 13, at 269-92.

¹⁸³ *Id.* at 244.

¹⁸⁴ *Id.* at 245.

¹⁸⁵ Compare notes 159-64 and accompanying text *supra* with note 166 and accompanying text *supra*; compare notes 170-77 and accompanying text *supra* with note 181 and accompanying text *supra*.

the eighth amendment, but when the weight of this comparison is added to that of the factors previously discussed, the argument for unconstitutionality becomes persuasive.

CONCLUSION

In this Note, the New York drug law has been analyzed within the framework of those factors which courts consider most important in determining the constitutionality of penal statutes subjected to attack under the eighth amendment. Based upon the case law and commentary discussed herein, it is clear that a sound and convincing case can be made for finding the penalties prescribed under the new law unconstitutional as "cruel and unusual" punishment.

The law is cruel in that it permits no consideration of the qualities of the offender, the nature of his offense, or the circumstances giving rise to his conduct. It is retrogressive in its emphasis on deterrence at a time when the scant authority available suggests that the deterrent value of severe sentences is highly suspect when directed at illicit drug activity. It is unusual when contrasted with the treatment accorded individuals committing similar crimes in other jurisdictions and more serious crimes within the same jurisdiction. Finally, and most importantly, it is senseless. An understanding of the nature and causes of drug abuse, a topic beyond the scope of this Note, leads inexorably to the conclusion that the criminal law cannot supply a solution to the problem of drug abuse. In the long run the answer lies in the development of a multifaceted program of education and rehabilitation with an interim utilization of dependence-maintenance programs, civil commitment procedures, and minor criminal sanctions.¹⁸⁶

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¹⁸⁶ See, e.g., Abrams, *Accountability in Drug Education*, 2 CONTEMP. DRUG 353 (1973); Irwin, *A Rational Approach to Drug Abuse Prevention*, 2 CONTEMP. DRUG 3 (1973); Israel & Denardis, *supra* note 50.